

Trump, Taricco, Turks and Tusk

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Maximilian Steinbeis Sa 4 Feb 2017

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Dear Friends of Verfassungsblog,

this has, once again, not been the happiest week for constitutionalists. Donald Trump's barrage of executive orders had many of us gasping from shock and bewilderment, most of all the order to detain and, in some cases, deport citizens of seven predominantly Muslim countries regardless of their right of residence in the US. Constitutionally, the President is widely unrestrained in matters of foreign policy in the US – but that does not necessarily mean that the Constitution [lets him get away with deliberately arbitrary measures](#), as MOHAMMAD FADEL points out in his stringent analysis of the "Muslim ban". And then there is international law: [The ways this policy violates the international obligations](#) of the US are detailed in our interview with JAMES HATHAWAY, among them the duty not to discriminate refugees for reasons of country of origin or religion. The US are under no legal duty whatsoever, though, to take in refugees at all, as their commitment to refugee resettlement – the largest, besides Canada and Australia, by far in the world – is purely voluntary. This results in a horrible catch-22 situation for proponents of international refugee law: If they take the US government to court, the Republicans might be induced to dump the resettlement program entirely, leaving those in need of protection in a much worse situation than before...

Mayors of US cities have been among the fiercest critics of President Trump's immigration policy, offering their cities as „sanctuaries“ to undocumented aliens threatened by deportation. Trump, in his turn, has declared his determination to strip these cities from federal funding. As HELMUT PHILIPP AUST explains, the [phenomenon of „Sanctuary Cities“](#) is nothing new in the US but part of an ongoing competence struggle between the Federal and the State level of legislation. Fun fact: it might have been the late Supreme Court Justice Antonin Scalia, of all people, who set up a possible legal stumbling block for President Trump to trip over in his 1997 opinion in *Printz vs. United States*, where he claimed that “the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs”.

The part of the US constitution that could become a real problem for the billionaire President with his many business interests abroad [is the so-called „Emolument Clause“](#) which forbids holders of public office to accept remunerations „of any kind whatever“ from foreign countries. JUD MATHEWS examines the merits of a complaint filed by a nonprofit government ethics group in federal court. They might have a case, he finds, but likely no standing to get it heard in court: the infamous *Clapper v. Amnesty International* ruling from 2013, by which the Supreme Court rejected Amnesty's standing to protest surveillance, makes it hard for citizens to hold the government legally accountable for constitutional overstepping.

Judges of Europe

While Trump dominated the headlines, another huge issue of concern for the constitutionalist community in Europe went by largely undetected: The authority of the European Court of Justice has been challenged and contested in unprecedented ways in recent weeks. As MIKAEL MADSEN, HENRIK PALMER OLSEN and URSKA SADL report, the [Danish Supreme Court is openly defying the Luxembourg court](#) with a boldness that would even make the Second Senate of the German Federal Constitutional Court writhe with unease. In Italy, the Constitutional Court has just sent back a case back to Luxembourg for the second time, insisting that the CJEU takes its concerns about Italian constitutional traditions seriously – MARCO BASSANI and ORESTE POLLICINO's [analysis of the Taricco decision is here](#), and PIETRO FARAGUNA's [here](#). DANIEL SARMIENTO has a [stern warning for the Luxembourg judges](#) to resist the urge to engage in any more haughty snubbing exercises at the cost of their national counterparts, unless they want to inflict some serious damage on the coherence of EU law.

Another challenge for the EU, albeit more political than legal, is coming from Romania where streets are filling

with protesters every night after the government has dismembered anti-corruption laws to shield corrupt politicians from justice. [What this is all about and why it matters constitutionally is explained](#) in a lucid post by BIANCA SELEJAN-GUTAN.

Romania might follow the tracks of Poland as the next target of a EU rule of law investigation, which maybe gives the Commission an opportunity to grow back some teeth. Spain, on the other hand, seems also an interesting case with the Polish experience in mind: DANIEL TODA CASTÁN reports on the way the [Spanish Senate handled the nomination of a number of judges to the Spanish Constitutional Tribunal](#), putting political party interests above its obligation to give the autonomous regions a voice in the constitutional court. This as well as the Polish case, Daniel claims, should make all of us think long and hard about the regulations regarding our constitutional courts and the possibilities of political manhandling they hold.

The Italian Constitutional Court, besides its Taricco decision, has handed down its judgment in the case of the [Italian electoral law. What this judgment entails and whether it adds to the prospect of making the messy political landscape of Italy any tidier](#) is explained by FRANCESCO CLEMENTI.

AIDAN O'NEILL picks apart once more the UK Supreme Court's momentous [Miller decision about Brexit as a matter of no concern for the devolved assemblies in Scotland, Northern Ireland and Wales](#), in his view "essentially a case which was argued before, and decided by, the court on the basis of the *English Imperial* constitutional tradition forged in the Victorian age."

Turkey is facing something far worse than Victorianism, constitution-wise. TOLGA SIRIN offers an [analysis of the proposed constitutional amendments transferring the pluralistic democracy in Turkey](#) into a "winner-take-all loser-lose all" system of unencumbered Presidential power without any meaningful checks and balances.

All heartache about democratic values aside, Turkey remains a trusted partner for the EU to keep the lid on the refugee influx into Europe, and so might be Libya soon if the latest EU Council meeting in Malta is anything to go by. DANA SCHMALZ [reminds the EU leaders of the legal and ethical boundaries their refugee policy with respect to Libya](#) as a place of allegedly systematic torture underlie, and of the fact that the refugee crisis offers the EU an opportunity to stand united (as Council President Tusk so insistently demands) in being and remaining an open society in the face of an aggressively exclusive USA (in German).

Elsewhere

- More castigation for Trump's Muslim ban comes, among many, from BASAK CALI who [berates the US government for "consciously deciding to ignore and misrepresent" international refugee law](#), from REBECCA HAMILTON who finds that [Trump's claim that this measure is necessary for national security simply does not add up](#), from PETER SPIRO who believes that [the order's constitutional undoing might be the fact that it is so "monumentally stupid"](#), and from SANDY LEVINSON more generally on [Trump building a "constitutional dictatorship"](#).
- STEVE PEERS finds [equally disrespectful words for the UK government's Brexit White Paper, calling it "the political equivalent of a cat coughing up a hairball"](#),
- PHILIP ALLOTT raises his eyebrows about [what he calls "our first post-legal legal event": the "grossly mistitled EU \(Notification of Withdrawal\) Act 2017"](#),
- PIET EECKHOUT demands an [alternative reading for Art. 50 EUV that gives Parliament a real possibility to say no to the government's deal without the immediate result, for lack of time to renegotiate, of "a fall off the Brexit cliffs"](#),
- after the Parliament formally involved and the Scottish, Welsh, and Northern Irish assemblies categorically sidelined in the Brexit procedure, KATIE GHOSE [finds good reasons to listen to the citizens directly after all the talk about taking back control and so forth](#),
- another noteworthy post by STEVE PEERS [examines the Lounani decision by the CJEU about alleged terrorists claiming refugee status](#),
- FRANCESCO PALLANTE notifies us of a [decision by the Italian Constitutional Court on how to reconcile](#)

[balanced budget requirements with fundamental rights of citizens hit by austerity measures](#) (in Italian), and

- MANUEL MÜLLER raises alarm about the EU as a community of law threatened by [CJEU-defying national constitutional courts in AJOS and Taricco](#) and wonders if the bucolic idea of a hierarchy-free "Verfassungsgerichtsverbund" of national and European courts on equal footing might turn out to be a fair-weather construction, particularly when courts in Hungary or Poland acquire a taste for that kind of national self-determination (in German).

All best,

Max Steinbeis

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SUGGESTED CITATION Steinbeis, Maximilian: *Trump, Taricco, Turks and Tusk*, *VerfBlog*, 2017/2/04, <http://verfassungsblog.de/trump-taricco-turks-and-tusk/>.